

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
APR -2 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2008-0040
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
STEPHEN JOSEPH TUCCI,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070708

Honorable Nanette M. Warner, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson

Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Rose Weston and M. Edith Cunningham

Tucson
Attorneys for Appellant

PELANDER, Chief Judge.

¶1 An eight-member jury found Stephen Tucci guilty as charged of theft of a means of transportation, third-degree burglary, and possession of burglary tools. The trial court sentenced him to concurrent, substantially mitigated prison terms the longest of which is 7.5 years. Tucci's sole issue on appeal is whether the court committed structural, or at least fundamental, error by empaneling a jury of only eight rather than twelve members. We affirm.

¶2 Before trial, the court raised the issue of whether it could empanel an eight-member jury. In the indictment, the state had alleged Tucci had two prior historical convictions. Considering that allegation, the trial court noted Tucci was facing over thirty-years' imprisonment, if the prior convictions were established and consecutive sentences were imposed. When the prosecutor replied, "[t]he State would not be seeking a stacked sentencing," the court asked for an agreement between the parties. In response, the prosecutor suggested Tucci waive his right to a twelve-member jury. The following exchange then occurred:

[Defense counsel]: My client is willing to waive a twelve-person jury.

THE COURT: Sir, you understand if, potentially, you are facing exposure to more than 30 years, you have the right to a twelve-person jury, and the State has already said they are agreeing or would not seek that these offenses would be stacked, so if you are convicted of all offenses and they prove both priors, you would be capped at 25 years.

Do you understand that?

THE DEFENDANT: Yes

THE COURT: Do you want me to seat—if I seat twelve doesn't mean you will get 30 years or seat eight doesn't mean you will get 25 years either, just we are just looking at what your maximum exposure would [be].

[Do] you want eight or twelve?

THE DEFENDANT: We can go with eight, that is fine.

THE COURT: Okay, thank you.

The court empaneled an eight-person jury, which found Tucci guilty of all three offenses charged.

¶3 Tucci argues reversal is required because he was entitled to a twelve-member jury and did not validly waive that right. The Arizona Constitution provides that, when a defendant faces death or thirty years or more imprisonment, the jury “shall consist of twelve persons.” Ariz. Const. art. II, § 23; *see also* A.R.S. § 21-102(A). When a potential sentence is less than thirty years, an eight-member jury is permissible. § 21-102(B). Because Tucci consented to a jury of eight below, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). But the “[i]mproper denial of a twelve-person jury is fundamental error that may provide a basis for relief even if not raised in the trial court.” *State v. Kuck*, 212 Ariz. 232, ¶ 8, 129 P.3d 954, 955 (App. 2006); *see also State v. Maldonado*, 206 Ariz. 339, ¶ 10, 78 P.3d 1060, 1063 (App. 2003); *State v. Smith*, 197 Ariz. 333, ¶ 21, 4 P.3d 388, 395 (App. 1999). We review de novo whether a defendant had a right to a twelve-person jury, *Kuck*, 212 Ariz. 232, ¶ 8, 129 P.3d at 955, but review the trial court’s

implicit finding that defendant waived that right for an abuse of discretion. *See State v. Djerf*, 191 Ariz. 583, ¶ 35, 959 P.2d 1274, 1285 (1998).

¶4 Based on the state’s allegation of two prior historical convictions against Tucci and the fact that, at a minimum, the sentence for possession of burglary tools could have been imposed consecutive to the other two sentences, the state acknowledges Tucci faced a possible total sentence of more than thirty years. The trial court so found, and we agree. Therefore, Tucci had a constitutional right to a twelve-member jury. *See* Ariz. Const. art. II, § 23; *see also* § 21-102(A).

¶5 Tucci asserts his alleged waiver of that right was invalid because the court failed to “make on-the-record findings about whether [he] knowingly, voluntarily, and intelligently wished to waive his right to a twelve-person jury.”¹ The state responds that Tucci’s agreement to proceed with an eight-member jury was a valid waiver of his right.

¶6 The right to a twelve-person jury may be waived by the same procedure as waiver of a jury trial. *State v. Prince*, 142 Ariz. 256, 258, 689 P.2d 515, 517 (1984); *see also Smith*, 197 Ariz. 333, ¶ 16, 4 P.3d at 393. That procedure is outlined in Rule 18.1(b)(1), Ariz. R. Crim. P., which provides: “Before accepting a waiver the court shall address the defendant personally, advise the defendant of the right to a jury trial and ascertain that the

¹Tucci correctly asserts his trial counsel could not waive the right to a twelve-member jury for him. *See Smith*, 197 Ariz. 333, ¶ 17, 4 P.3d at 394 (“[D]efendant’s right to a twelve-person jury under the Arizona Constitution is a right so inherently personal that it cannot be waived by defense counsel; only the defendant can waive it.”). Therefore, we focus on the validity of Tucci’s personal waiver.

waiver is knowing, voluntary, and intelligent.” *See also Maldonado*, 206 Ariz. 339, ¶ 12, 78 P.3d at 1063. The waiver of a jury trial “is valid only if the defendant is aware of the right and manifests an intentional relinquishment or abandonment of such right.” *State v. Baker*, 217 Ariz. 118, ¶ 7, 170 P.3d 727, 729 (App. 2007).

¶7 Tucci concedes the trial court satisfied the first requirement of Rule 18.1(b)(1) by personally addressing him and informing him he had the right to a twelve-person jury. Regarding the rule’s second requirement, however, Tucci contends the court had to find expressly on the record he knowingly, voluntarily, and intelligently waived that right. Tucci maintains that, by neglecting to ascertain his understanding of the right he was giving up, whether he was coerced or threatened, and his mental competency, the court failed to give the litany required by *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (error to accept guilty plea without affirmative showing of voluntary and intelligent waiver).² *See also State v. Avila*, 127 Ariz. 21, 24-25, 617 P.2d 1137, 1140-41 (1980).

¶8 *Boykin*, however, does not require an express waiver of a constitutional right as long as the record shows the defendant knowingly and voluntarily gave up his right. *See State v. Zaye*, 108 Ariz. 13, 13, 492 P.2d 392, 392 (1972); *see also Prince*, 142 Ariz. at 258, 689 P.2d at 517 (“record must show a knowing waiver by the defendant”); *State v. Jackson*,

²*Boykin v. Alabama*, 395 U.S. 238 (1969). The *Boykin* litany refers to the information that must be provided to a defendant before determining he has knowingly, intelligently, and voluntarily waived his constitutional right to a trial. *State v. Conroy*, 168 Ariz. 373, 374 n.1, 814 P.2d 330, 331 n.1 (1991).

16 Ariz. App. 388, 389, 493 P.2d 934, 935 (1972). And our supreme court has determined the entire *Boykin* litany is not required for waiver of a jury trial. *See State v. Conroy*, 168 Ariz. 373, 375, 814 P.2d 330, 332 (1991); *see also State v. Butrick*, 113 Ariz. 563, 566, 558 P.2d 908, 911 (1976) (jury trial waiver not tantamount to guilty plea). As stated in *Conroy*, a defendant waiving “the right to a jury trial need not be afforded the exact procedural protections provided to those whom we treat . . . as if they were pleading guilty.” 168 Ariz. at 375, 814 P.2d at 332. Rather, whether the waiver was valid depends on the particular constitutional right being waived. *See id.*

¶9 Rule 18.1(b)(2) states the form of the waiver can “be made in writing or in open court on the record.” *See also Butrick*, 113 Ariz. at 566, 558 P.2d at 911 (emphasizing waiver may be either written or in open court). Whether the waiver was made intelligently and voluntarily depends on “the unique circumstances of each case.” *Id.*; *State v. Smith*, 112 Ariz. 321, 323, 541 P.2d 918, 921 (1975). Here, contrary to Tucci’s assertion that the trial court’s “silent record” was insufficient, Tucci’s waiver is recorded in the transcript of his conversation with the court before trial. The court informed Tucci he had a right to a twelve-member jury and asked him if he wanted eight or twelve jurors. Tucci replied, “We can go with eight, that is fine.”

¶10 Tucci’s interaction with the court is one of the circumstances to be considered in determining whether his waiver was valid. *See State v. Little*, 104 Ariz. 479, 481, 455 P.2d 453, 455 (1969) (extent trial judge discusses matter with defendant is one circumstance

to consider). Although “the better practice would be for the trial judge to make specific findings regarding defendant’s waiver, the absence of such findings does not amount to reversible error if the record adequately shows that defendant’s waiver was knowing, intelligent, and voluntary.” *State v. Russell*, 175 Ariz. 529, 532, 858 P.2d 674, 677 (App. 1993) (addressing waiver of right to counsel). The record here adequately reflects a valid waiver of Tucci’s right to a twelve-person jury.

¶11 Additionally, although Tucci correctly asserts his attorney could not waive that right for him, *see Smith*, 197 Ariz. 333, ¶ 17, 4 P.3d at 394, the presence and assistance of his attorney at the time of the waiver may be considered. *See Little*, 104 Ariz. at 481, 455 P.2d at 455 (defendant waived right to jury trial by answering judge’s question with assistance of counsel). Tucci’s attorney was present and initially suggested proceeding with an eight-member jury. Before accepting Tucci’s waiver, the trial court personally addressed him, explained the possible maximum sentence he faced with an eight-member jury, and asked him if he wanted eight or twelve jurors. We presume the court was aware of the relevant law and applied it correctly when accepting Tucci’s waiver and determining that he validly waived his right. *See State v. Moody*, 208 Ariz. 424, ¶ 53, 94 P.3d 1119, 1139 (2004).

¶12 Tucci does not claim he was coerced or threatened into accepting his attorney’s recommendation to proceed with eight jurors or did not understand his right.³ Nor does he

³Tucci argues he was “induced to waive his constitutional right” when the prosecutor promised to refrain from seeking consecutive sentences because this promise “was never fulfilled.” But Tucci’s argument is not supported by the record. At sentencing, the state did

suggest he was mentally incompetent. *Cf. State v. Decello*, 111 Ariz. 46, 49, 523 P.2d 74, 77 (1974) (no need for competency hearing on waiver when defendant found competent to stand trial). Tucci stated affirmatively and unequivocally he was willing to go to trial with eight jurors, and the court informed Tucci of his right to twelve jurors before accepting his waiver. Thus, the record satisfactorily establishes Tucci was aware of his right to a twelve-member jury and knowingly, voluntarily, and intelligently relinquished it. *See Baker*, 217 Ariz. 118, ¶¶ 7-8, 170 P.3d at 729. In view of his valid waiver of the right to a twelve-person jury, the trial court committed neither fundamental error nor structural error (even assuming that concept otherwise would apply here) by proceeding with an eight-person jury trial.

¶13 Tucci's convictions and sentences are affirmed.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

PHILIP G. ESPINOSA, Judge

not seek consecutive sentences and asked for presumptive sentences on all counts. Therefore, this argument is without merit.